

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 25, 2007

MICHAEL A. S. GUTH v. SUNTRUST BANK, INC.

Appeal from the Circuit Court for Anderson County
No. A5LA0501 Donald R. Elledge, Judge

No. E2006-00212-COA-R3-CV - FILED APRIL 17, 2007

Michael A. S. Guth ("Plaintiff") sued Suntrust Bank, Inc. ("the Bank") for negligence and violation of the Tennessee Consumer Protection Act of 1977, among other things, after the Bank debited \$3,019.50, from Plaintiff's checking account to cover three money orders, later discovered to be counterfeit, that Plaintiff cashed at the Bank. The Bank filed a motion to dismiss for failure to state a claim upon which relief can be granted, which the Trial Court granted. Plaintiff appeals to this Court. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Dr. Michael A. S. Guth, Oak Ridge, Tennessee, Pro se Appellant.

Michael L. Powell, Knoxville, Tennessee, for the Appellee, Suntrust Bank, Inc.

OPINION

Background

Plaintiff is an attorney who has what he describes as “an Internet-based law practice.” Plaintiff was contacted via e-mail by a person who claimed to be in London, England, and in need of assistance with the probate of an estate. Plaintiff’s client had three money orders sent to Plaintiff who was to cash the money orders and wire the cash to London. The money orders were for \$1,000.00, each. Plaintiff took the money orders to Western Union in Oak Ridge, Tennessee, but Western Union would not accept the money orders for wire transfer. Plaintiff then took the money orders to the Bank, where Plaintiff maintained his personal checking account, to cash.

At the Bank, Plaintiff explained to the teller that he did not want the money orders to be linked to his personal account since these money orders were client funds and Plaintiff did not want to co-mingle them with his own monies. Plaintiff does not typically handle client funds and does not maintain a trust account for client funds. The teller instructed Plaintiff to endorse the money orders ‘not for intended use.’ Plaintiff did so, took the cash, and wired it to his client in London. The Bank later discovered that the money orders were counterfeit and debited Plaintiff’s personal checking account in the amount of \$3,019.50, the amount of the money orders plus a returned check fee.

Plaintiff sued the Bank for negligence claiming, among other things, that the Bank was negligent in failing to properly inspect the money orders prior to cashing them, failing to recognize that the money orders were counterfeit prior to giving Plaintiff cash for them, failing to comply with Plaintiff’s instructions not to link the money orders to Plaintiff’s personal account, and failing to properly instruct Plaintiff on the correct endorsement to protect Plaintiff. Plaintiff filed an Amended Complaint that also alleged that the Bank had violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.* The Bank filed a motion to dismiss for failure to state a claim upon which relief can be granted. The Trial Court granted the Bank’s motion by order entered January 20, 2006. Plaintiff appeals to this Court.

Discussion

Plaintiff raises seven issues in his appellate brief. In his reply brief, Plaintiff withdraws several of the issues raised in his appellate brief and attempts to raise several new issues. While Plaintiff may withdraw issues originally raised by him, Plaintiff may not raise new issues for the first time in his reply brief leaving the Bank, the appellee, with no opportunity to reply to these untimely raised issues.

Rule 27 of the Tennessee Rules of Appellate Procedure provides that the brief of the appellant shall contain a statement of the issues presented for review. Tenn. R. App. P. 27(a)(4). As the appellant, Plaintiff is entitled to file a reply brief “in reply to the brief of the appellee.” Tenn. R. App. P. 27(c). Plaintiff, however, is not entitled to raise new or different issues in his reply brief,

which, under the Rules, the Bank as the appellee has no opportunity to answer. To the extent that the issues Plaintiff attempts to raise in his reply brief are in response to the Bank's arguments as raised in its brief, these issues have been fully considered and will be discussed below. To the extent that the issues Plaintiff attempts to raise in his reply brief are new issues, they have not been considered by this Court.

Regardless, we find that the dispositive issue in this case is whether the Trial Court erred in granting the Bank's motion to dismiss. The Bank raises as an issue whether this is a frivolous appeal and requests an award of attorney's fees on appeal.

Our Supreme Court has described the standard of review of a trial court's granting of a motion to dismiss under Rule 12.02 as follows:

A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof. Such a motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action as a matter of law. In ruling upon a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true. The motion to dismiss should be denied unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. In considering this appeal from the trial court's grant of the defendants' motion to dismiss, we take all allegations of fact in the plaintiff's complaint as true, and review the lower courts' legal conclusions de novo with no presumption of correctness. Tenn. R. App. P. 13(d); *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997); *Pursell v. First American Nat'l Bank*, 937 S.W.2d 838, 840 (Tenn. 1996); *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994).

Bell v. Icard, 986 S.W.2d 550, 554 (Tenn. 1999).

Plaintiff's Amended Complaint alleges negligence and violation of the Tennessee Consumer Protection Act of 1977, and also claims that the Bank was precluded from debiting funds from Plaintiff's account under Tenn. Code Ann. § 47-3-418(c). Plaintiff's reply brief withdrew the issues initially raised regarding the alleged violation of the Tennessee Consumer Protection Act of 1977, and the claim that the Bank was precluded from debiting funds from Plaintiff's account under Tenn. Code Ann. § 47-3-418(c). While Plaintiff's appellate brief contains an argument regarding promissory estoppel, Plaintiff's Amended Complaint, which is the complaint the Trial Court dismissed, contains no claim for promissory estoppel. Given all this, we will address only the claim for negligence as contained in Plaintiff's Amended Complaint and addressed by Plaintiff in his briefs on appeal.

“[A] negligence action requires evidence proving the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) defendant’s breach of that duty; (3) injury; (4) causation in fact; and (5) proximate, or legal, cause.” *Naifeh v. Valley Forge Life Ins. Co.*, 204 S.W.3d 758, 771 (Tenn. 2006).

Plaintiff’s Amended Complaint alleges, in part, that the Bank owed Plaintiff a fiduciary duty or a “duty of care to protect its customers from fraudulent, counterfeit, and unauthorized transactions that might lead to financial losses for its customers.”

Our Supreme Court has very clearly stated that under Tennessee law, the relationship of a bank to a depositor is simply a debtor/creditor relationship and the bank owes the depositor no fiduciary duty. *Glazer v. First Am. Nat’l Bank*, 930 S.W.2d 546, 550 (Tenn. 1996). Given this, the Bank owed Plaintiff, a depositor, no fiduciary duty.

Plaintiff’s Amended Complaint also alleges that the Bank “enjoys a Tennessee statutory right under some conditions to offset customer accounts for negotiable instruments deposited by customers that are subsequently dishonored [and] [b]ecause of this awesome power to hold its customers liable and hold itself harmless in the face of dishonored negotiable instruments, [the Bank] owes its customers an enhanced duty of diligent care to prevent circumstances where the bank would wield this awesome power and deduct funds from customers’ accounts without their knowledge or permission.”

Although Plaintiff asserts that the Bank owed him an enhanced duty of care by virtue of the Bank’s statutory right to offset customer accounts in some circumstances, Plaintiff has cited to no statute, case law, rule, or regulation to support this assertion, and our research fails to reveal any law in support of Plaintiff’s assertion. *Glazer*, however, does establish that the Bank owes no such enhanced duty to Plaintiff under the facts of this case. *Id.*

Plaintiff’s Amended Complaint also alleges that the Bank breached a duty of care owed to Plaintiff by “failing to train its tellers on the correct and proper endorsements under Tennessee law,” by failing to “train its tellers on methods to detect counterfeit money orders so as to avoid unnecessary losses borne by its customers,” and by “failing to file a claim with its insurance carrier for this foreseeable loss to a bank...” Again, however, Plaintiff has cited to no statute, case law, rule, or regulation to support these assertions, and our research fails to reveal any law in support of Plaintiff’s assertions. *Glazer* still controls. *Id.*

Plaintiff’s Amended Complaint failed to allege any legal duty owed to him and breached by the Bank. Therefore, even if we take all of the factual allegations in the Amended Complaint as true and construe the Amended Complaint liberally in favor of Plaintiff, as we must, we find and hold that Plaintiff has alleged no facts that would constitute a cause of action for negligence as a matter of law. Given this, the Trial Court correctly granted the Bank’s motion to dismiss.

We turn now to the Bank's issue regarding frivolous appeal and its request for attorney's fees. "A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that [an appeal] can ever succeed.'" *Morton v. Morton*, 182 S.W.3d 821, 838 (Tenn. Ct. App. 2005) (quoting *Industrial Dev. Bd. of the City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995)). As discussed above, Plaintiff's reply brief withdrew nearly all of his issues leaving only his claim for negligence. As for Plaintiff's claim for negligence, the law in Tennessee clearly states that a bank does not have a fiduciary or otherwise enhanced duty to a depositor and Plaintiff has cited to no statute, case law, rule, or regulation to support his assertions that the Bank owed him any such fiduciary or enhanced duty. As such, Plaintiff's negligence claim had no reasonable chance of success on appeal. Given all this, we hold that Plaintiff's appeal was frivolous, and we award the Bank its attorney's fees on appeal. We remand this case to the Trial Court for a determination of the appropriate amount of attorney's fees.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for a determination of the amount of the Bank's attorney's fees on appeal, and for collection of the costs below. The costs on appeal are assessed against the Appellant, Michael A. S. Guth.

D. MICHAEL SWINEY, JUDGE